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in a regulation not of interstate commerce but of another subject which Congress is not empowered to regulate, — the liabilities of employer to employee.

EFFECT OF LAPSE ON EXECUTORY GIFTS OTHERWISE ILLEGAL. — An executory devise or bequest cannot take effect unless the precise contingency happen upon which it is conditioned. Divestiture must be by the testator's express authority, and if the appointed contingency do not happen, lapse of the preceding interest is not enough.[1] The contingency may, however, be such as to be contained in such a lapse. For instance, a gift over if A die under twenty-one takes effect if A, during his minority, predecease the testator.[2] An executory gift must also run a second gauntlet. Though adequately satisfying the testator's intention as declared in his will, it may yet fall foul of some collateral rule of law. Since a will is ambulatory and without legal significance till the testator's death,[3] that would seem the sensible period to look to in order to determine whether its provisions are obnoxious. The law takes no wanton pleasure in thwarting the intention of testators. Accordingly, if the presence of a preceding interest is the sole objection to the legality of a gift, failure of that interest before the testator's death should remove all taint of illegality.

The rule against perpetuities adopts this sane view. A gift, too remote at the writing of the will, nevertheless stands if by lapse of preceding interests it is at the testator's death no longer too remote.[4] An analogous case presents itself where a life interest is given in a consumable chattel. The nature of the property is such that a life interest carries the entire ownership, and a gift over thereafter must normally fail. But if the life interest lapse, the objection disappears. An English case, however, holds otherwise.[5] Similarly where a fee is given in land or an absolute interest in personalty, a gift over in the event that the first taker die intestate, or not having parted with it in his lifetime, is bad, because a real or fancied restraint upon the preceding gift.[6] If, however, by lapse there is at the testator's death no preceding interest that can be illegally intrenched upon, all reason again vanishes for invoking a collateral rule of law to foil the testator. And so the American cases hold.[7] Two English cases[8] to the contrary have been disapproved,[9] but not overruled.

A Missouri court has recently passed upon this question without reference to the adjudged law or its analogies. A testator gave his brother money, directing that any remainder at his death be divided between two nieces. The brother predeceased the testator. The court declared that the testator had given expression to two irreconcilable purposes, the first of

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[1] Tarbuck *v.* Tarbuck, 4 L. J. Ch. 129.

[2] Mathis *v.* Hammond, 6 Rich. Eq. (S. C.) 121; Wager *v.* Wager, 96 N. Y. 164. *Cf.* Jones *v.* Westcomb, 1 Eq. Cas. Abr. 245, pl. 10; Avelyn *v.* Ward, 1 Ves. Sr. 420. See 2 Jarman, Wills, 6 ed., 760–768.

[3] Lomax *v.* Holmden, 1 Ves. Sr. 290.

[4] *In re* Lowman, [1895] 2 Ch. 348. See Gray, Rule Perp., § 231.

[5] Andrew *v.* Andrew, 1 Coll. 686.

[6] See Gray, Restraints on Alien., §§ 56, 57, 74 a; 17 HARV. L. REV. 190.

[7] Burbank *v.* Whitney, 24 Pick. (Mass.) 146; Crozier *v.* Bray, 39 Hun (N. Y.) 121. See Eaton *v.* Straw, 18 N. H. 320, 333.

[8] Hughes *v.* Ellis, 20 Beav. 193; Greated *v.* Greated, 26 Beav. 621.

[9] *In re* Stringer's Estate, 6 Ch. D. 1, 15. But *cf.* 2 Jarman, Wills, 6 ed., 19.

which was clearly dominant, and that the gift over was therefore repugnant and void. *Young* v. *Robinson*, 99 S. W. Rep. 20 (K. C. Ct. App.). There is in the nature of things nothing irreconcilable about giving property to one person, and what remains at his death to another. Talk about repugnancy, common with American courts, only befogs real objections.[6] The testator here directed that, if any of the money were left at his brother's death, the nieces should have it, — a perfectly rational contingency. Only a casuist could argue that, because all was left, the contingency was not satisfied. Ordinarily a collateral rule of law would defeat the gift over, either because unlawfully derogating from a preceding gift, or because, as so often alleged, repugnant to it. But here is no longer any interest from which there can be derogation or to which there can be repugnance. The problem is somewhat complicated by a residuary clause, and another directing that the shares of those who should die before receiving them should fall into the residue. The latter clause would seem naturally to provide only against a lapse in the residue, for specific legacies would fall into it anyhow;[10] but the court construed it to refer to both. The true result is not thereby changed, for it must be read as a provision of lapse only. Where a specific legacy is given to two persons in succession, the death which shall throw the whole into the residue must be taken to be that of the last person in the series entitled.[11]

LIABILITY OF A SURETY AFTER PAYMENT BY AN INSOLVENT DEBTOR HAS BEEN RECOVERED BY HIS TRUSTEE IN BANKRUPTCY. — The cases are in conflict whether the payee of a note, who has been compelled to surrender a payment as a fraudulent preference, can still hold the sureties. A recent case holds that he may, though having known of the debtor's insolvency. *Hooker* v. *Blount*, 97 S. W. Rep. 1083 (Tex., Civ. App.). An objection which may be urged at the outset is that the note has been paid and the surety parties thereby discharged. It has, however, often been held that an invalid payment does not release the surety, even though the note may have been cancelled in consequence.[1] The strongest reason for giving the surety a defense is that his right of subrogation has for a time been tied up, and consequently his risk increased. But this is a defense which rests upon equitable grounds and should be allowed only when it will do equity. Holding the surety discharged places the creditor in a peculiarly difficult situation. If he accepts a payment which afterwards he is obliged to refund as a fraudulent preference because of bankruptcy within four months, his rights against the sureties are gone. And yet the same result follows if he refuses to accept a payment tendered at maturity and bankruptcy does not follow.[2] In short, the only case where his remedy would be preserved against the surety is where payment is refused and bankruptcy does follow within the four months. The almost impossible task of determining the outcome of the debtor's financial situation should not in this way be imposed upon the creditor. An English case has held that when a creditor has innocently received a preference which he must pay back, he may still

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[10] Bagwell *v.* Dry, 1 P. Wms. 700.

[11] Morton *v.* Barrett, 22 Me 257.

[1] Williams *v.* Gilchrist, 11 N. H. 535; West Phila. Nat'l Bank *v.* Field, 143 Pa. St. 473. See also 17 HARV. L. REV. 205.

[2] Smith *v.* Old Dominion Bldg. & Loan Ass'n, 119 N. C. 257; Second Nat'l Bank *v.* Prewett, 96 S. W. Rep. 334 (Tenn.).